

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of)

THE LUTHERAN CHURCH/MISSOURI)
SYNOD)For Renewal of Licenses of)
Stations KFUD/KFUD-FM)
Clayton, Missouri)

MM Docket No. 94-10

File Nos. BR-890929VC
BRH-890929VBTO: The Honorable Arthur I. Steinberg
Administrative Law Judge

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARYOPPOSITION TO MOTION
TO MODIFY HEARING ISSUES

The Lutheran Church/Missouri Synod, licensee of Stations KFUD(AM) and KFUD-FM, Clayton, Missouri (collectively "KFUD"), by its attorneys and pursuant to Section 1.229 of the Commission's rules, hereby opposes the "Motion to Modify Hearing Issues" filed February 22, 1994 by The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively the "NAACP"). For the reasons set forth herein, the NAACP's motion is both procedurally and substantively flawed and must be denied.

1. In its Motion, the NAACP requests the Presiding Judge to "restate Hearing Issue #1" in this proceeding. Specifically, the NAACP requests that the issue be expanded to include whether KFUD complied with the nondiscrimination provisions contained in Section 73.2080(a) of the Commission's rules. As framed by the full Commission, Issue (1) seeks "to determine the extent to

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which the licensee of Stations KFUD/KFUD-FM complied with the affirmative action provisions specified in Section 73. 2080(b) of the Commission's Rules, 47 C.F.R. §73.2080." Thus, the NAACP is not requesting a simple modification but rather a re-write of the issue as framed by the full Commission.

2. The Hearing Designation Order ("HDO"), FCC 94-23, released February 1, 1994 in this proceeding, contains 12 single-spaced pages of discussion leading up to the designation of issues. All of the NAACP's arguments were considered, and the NAACP fails to point to any argument that was not considered. Based on its analysis, the full Commission designated the issues as presently framed. In Atlantic Broadcasting Company (WUST) et al., 5 F.C.C.2d 717, 721 (1966), the Commission stated:

If our designation order contains a reasoned analysis of a particular matter, we are confident that, in the absence of additional information on the subject, previously unknown to us, the subordinate officials will have no difficulty in adopting that analysis and denying the relief requested.

In Atlantic, the petitioner demonstrated that the Commission's Review Board failed to consider the merits of a petition to enlarge that had been filed. The NAACP has failed to demonstrate any such omission by the Commission. See also Fidelity Radio, Inc., 1 F.C.C.2d 661, 662 (1965). Accordingly, the NAACP's motion is seriously deficient from a procedural standpoint.

3. Moreover, there is no substantive merit to the NAACP's motion. The case is not about any instances of overt or intentional discrimination; rather it concerns the adequacy of

the applicant's affirmative action program. Thus, this case is unlike the cases relied upon by the NAACP in its motion. Rust Communications Group, Inc., 53 F.C.C.2d 355 (1975) involved specific instances of employment discrimination -- delay in resolving the employment application of one Black applicant and an allegation that very discriminatory remarks were made to a second Black applicant. Similarly, the issue designated in Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987) concerned misrepresentation and/or lack of candor about the licensee's consideration for employment and failure to hire a Black woman.


4. The NAACP's reliance on Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) and Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) is equally misplaced. In those cases, the Court reversed the Commission's orders granting renewal applications without hearings where the licensees had engaged in overt and intentional racial discrimination.

5. Since this case concerns the licensee's recruitment process and the compliance of that process with the Commission's rules and regulations as opposed to whether there were overt and intentional instances of discrimination, the issue is properly framed. Indeed, the issue is framed exactly as it was in Dixie Broadcasting, Inc., 7 FCC Rcd 5638 (1992), where the allegations also did not involve overt instances of discrimination.

In sum, for the reasons set forth above, the Motion to Modify Hearing Issues filed by the NAACP should be denied.^{1/}

Respectfully submitted,

THE LUTHERAN CHURCH/MISSOURI
SYNOD

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Dated: March 9, 1994

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^{1/} KFUD objects to the NAACP's repeated references to the allegations recited in the HDO as "findings" of the Commission. It is the trier of fact who must make the necessary findings based on a record to be developed. Otherwise, the evidentiary hearing is not a legally adequate opportunity for KFUD to introduce evidence and meet its burden of proof.

CERTIFICATE OF SERVICE

I, SYBIL R. BRIGGS, do hereby certify that I have this 9th day of March, 1994, mailed by first class United States mail, postage prepaid, copies of the foregoing "OPPOSITION TO MOTION TO MODIFY HEARING ISSUES" to the following:

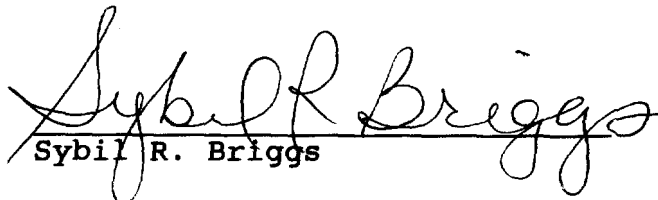
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